Supreme Court, U.S.
FILED
98 81732 APR 26 1999

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

R[redacted] F[redacted],

Petitioner,

v.

A[redacted] C[redacted] R[redacted] C[redacted] C[redacted]
and "JOSEPHINE," a pseudonym,

Respondents.

On Petition for Writ of Certiorari to the Massachusetts Appeals Court

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED

1. Whether the father's constitutional rights under the United States Constitution were infringed by the trial court's treatment of the guardianship case like a divorce case instead of like a state intervention case?

   a. Whether the lower courts erred by applying a mere preponderance of the evidence standard in a custody dispute between parents and a third party?

   b. Whether the lower courts erred by placing the burden of proof on the father to prove his fitness once the grandparents obtained custody of their granddaughter *ex parte*?

   c. Whether the lower courts erred by applying a definition of unfitness devoid of any parental character flaws?

2. Whether the father was deprived of fundamental procedural and substantive due process rights by the pre-trial procedures below which deprived the father of an opportunity to be heard and impaired the trier of fact's impartiality?

LIST OF PARTIES

Josephine[1] is the child whose custody is at issue in *Guardianship of Josephine* (unpublished).

R[redacted]F[redacted] is not a pseudonym for the biological father of Josephine.

C[redacted]F[redacted] is not a pseudonym for the biological mother of Josephine.

"A[redacted] and R[redacted]C[redacted] is not a pseudonym for the maternal grandparents of Josephine, who have guardianship of her.

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1. Josephine is a pseudonym chosen by the Massachusetts Appeals Court. It is standard procedure for the Appeals Court to assign a pseudonym to children in state intervention proceedings; it is not standard procedure to assign a pseudonym in divorce custody proceedings.

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OPINIONS BELOW

The unpublished opinion of Massachusetts Appeals Court appears at Appendix A. The denial of further appellate review by the Supreme Judicial Court of Massachusetts appears at Appendix D. The trial court's findings and conclusions of law appear at Appendix B to this petition and were part of the record in this Massachusetts Appeals Court and the Massachusetts Supreme Judicial Court.

The Findings, Briefs, Appendix, etc. were impounded by the Massachusetts Appeals Court for unexplained reasons and have been lodged under seal with the Clerk of this Court. Since it is standard procedure for the court to impound state intervention appeals, one must infer that this must be the reason since divorce custody cases are not impounded *sua sponte*.

STATEMENT OF JURISDICTION

The opinion of the Massachusetts Appeals Court which petitioner seeks to have reviewed was entered on December 3, 1998, and appears at Appendix A. A timely Application for Further Appellate Review was denied by the Massachusetts Supreme Judicial Court on January 25, 1999, which appears at Appendix D, which also includes the docket entry.

The opinions of the Massachusetts Appeals Court and Supreme Judicial Court do not directly address the petitioner's constitutional claims. Petitioner's brief filed in the Massachusetts Appeals Court raises the constitutional questions of which petitioner seeks review. It has been impounded by the Massachusetts State Appeals Court.

The petitioner's Application for Further Appellate Review re-raising the constitutional questions is also impounded.

This petition is filed within ninety days of January 25th, 1999, the date of the order of the state court of last resort, denying the Application for further Appellate Review. *See* Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution provide ". . . No state shall . . . deprive any person of life, liberty or property without due process of law . . ."

Massachusetts General Laws C. 201, § 5, guardianship statute, is set forth in Appendix E.

Massachusetts General Laws C. 208, § 28, divorce custody statute, is also set forth in Appendix E.

STATEMENT OF THE CASE

The fundamental question in this case is whether a father in a guardianship case is entitled to have the trial court apply the procedures and standards of a state custody action as opposed to a divorce custody action when the state is intervening in the family for the purpose of granting custody to a third party.

A. Procedural Background of the 1996 Judgment.

1. *Procedural History*

Shortly after the divorced father, R[redacted] F[redacted] (hereinafter "father" or "R[redacted]") filed a complaint for modification on May 20, 1992, to reduce child support due to the loss of his job as a computer engineer during an economic downturn, the maternal grandparents, R[redacted] and A[redacted] (hereinafter "the C[redacted]" or "the grandparents"), filed a Petition for Guardianship, and obtained custody of Josephine[2] *ex parte*.

The father was served with the guardianship notice one month after the grandparents obtained custody and immediately filed an objection to the petition for guardianship. At the time he was served the father had been in Texas seeking employment; he immediately returned to Massachusetts and amended his complaint for modification to seek custody of Josephine.

During the approximately four years of pretrial proceedings from the summer of 1992 until the trial on August 6, 1996, the father made several motions for custody[3] as well as a motion to compel, etc. The judgment was docketed on November 20, 1996, and granted only three hours per week

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2. Josephine is a pseudonym.

3. The agreement referred to by the Appeals Court decision merely provided for approximately equal time shared custody between the father and the grandparents during what was supposed to be a smooth transition period for Josephine from her grandparents to her father. There was no extension of the temporary guardianship at the time of the agreement, so the temporary guardianship theoretically expired.

of unsupervised visitation with the father on Sundays from 1:00 - 4:00 p.m.

On November 3, 1998, the Massachusetts Appeals Court issued an unpublished decision and a notice of docket entry affirming the trial court's judgment, from which the father unsuccessfully sought Further Appellate Review by the Supreme Judicial Court of Massachusetts, which was denied on January 25, 1999.

2. *Procedural Due Process Errors*

a. *Ex Parte* Communications

Frequently, the grandparent's attorney communicated directly with the trial judge:

1. Letter directly to the trial judge from grandparents' attorney regarding extending the temporary guardianship order (dated July 25, 1994, incorrectly stating that there was no opposition to the request.)

2. Grandparents' attorney's letter indicating that he 'personally spoke with the Judge'.

3. *Ex parte* motion for order suspending visitation (June 22, 1995).

4. Letter dated July 28, 1994 from grandparents' attorney directly to the trial judge regarding extending the guardianship and asserting that there is no opposition.

5. Letter from grandparents' attorney directly to judge requesting a *nunc pro tunc* child support order.

6. [Grandparents] *Ex parte* motion to vacate prior orders for visitation.

7. Letter from the grandparent's attorney directly to the trial judge asking him to amend the judgment.[4]

b. The Wrong Standard of Proof Was Applied By the Trial Judge

The trial judge in his conclusions applied only a preponderance of the evidence standard of proof. *See* Appendix B, p. 19a ¶11. *Also see* p. 19a ¶6.

B. Factual Background of the 1996 Judgment

1. *Introduction*

It is undisputed that the father has no criminal record, no history of abuse of anyone, no history of substance abuse, and is a hard-working computer engineer remarried to a woman ([redacted] who successfully raised her own children to productive adulthood.

Josephine, whose custody is the subject of the instant appeal, was born on March 25, 1983. On January 6, 1987, the father and Josephine's mother (hereinafter "mother" or "C[redacted]) were divorced. The father had joint custody and standard visitation rights, which he fully exercised.

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4. Similarly, about one year post-judgment on October 20, 1997, the *guardian ad litem* ("GAL", court investigator) wrote a letter to the trial judge requesting her fees and *the next day without a hearing*, she obtained an order for fifteen thousand seven hundred and seventy-five dollars ($15,775).

Due to an economic downturn in Massachusetts for computer engineers, the project on which the father had been working was terminated. In December of 1991, the father relocated to Texas, where he searched for employment. He maintained telephone contact with his daughter, Josephine, and his former wife, C[redacted]Due to poor mental health, about March 1, 1992, the Department of Social Services became involved with the mother. It is undisputed that neither the Department of Social Services nor the grandparents ever notified the father. The father was not served with notice of the temporary guardianship, granted *ex parte* on July 28, 1992, until August 18, 1992. The mother was never served.

2. *The Father and Daughter Had a Good Relationship According to the Daughter.*

The Court investigator (GAL) wrote that Josephine was openly affectionate to her father and that Josephine enjoyed the activities that she participated in with her father. Examples of places they went included the Boston Museum of Science, Boston Computer Museum and local parks.

The father gave appropriate help to Josephine with her homework, attended all school meetings to which he was invited, and wrote to obtain her records. The teacher described the science project that the father helped with as "fine".[5] Since Josephine attended a special education program, the father's plan was to enroll her in the same type of program.

Moreover, Josephine told her school psychologist that she has "a good relationship with her father". There was no evidence of the father's alleged lack of understanding of Josephine's needs beyond vague general statements by the

5. The grandmother had described this same project as a "disaster".

court investigator (GAL). Moreover, the evidence is clear that the only time Josephine did not want to go to visits was when there was an activity, such as a friend's party, which was scheduled to occur during the same time slot.

3. ***The Decrease in Father's Visitation was Due to a Clever Use of an Ex Parte Order While the Father Was Unrepresented and Bears No Relationship to his Ability to Meet Josephine's Needs.***

The loss of weekend visitation occurred after the grandparents made an *ex parte* motion for order suspending visitation based on Josephine's not wanting to miss social activities. The grandparents refused the father any "makeup" time for lost visits.

4. ***The Court Placed the Burden of Proof On the Father.***

The court investigator ("GAL") testified that the father failed "to woo Josephine"; she also placed the burden of proof on the father by requiring him to have a psychological evaluation, which concluded that the father is "normal". Why wasn't the grandfather, who has a history of mental illness, required to go for a psychological evaluation?

In short, due process was infringed here both by treating a guardianship in a third party case (versus a parent) by the procedures and standards applicable to a divorce case and by the multiple *ex parte* communications with the trial judge, which corrupted his objectivity.

C. Statement in Accordance With United States Supreme Court Rule 14(1)(g)(i)

The constitutional issue regarding the standard of unfitness was raised before the trial court in a memorandum of law (A[6]. IV 134, 151, 157). Raising the issue of the failure of the evidence to support a finding of unfitness, under the appropriate definition of unfitness, the father's trial attorney made the requisite motion for directed verdict. (Tr. 125). The lack of procedural due process was raised below by implication *passim* in requests for a trial date during the approximately four years of pre-trial proceedings, Motions for Custody, Motions for a hearing etc.

The argument that the case was treated like a contest between two parents instead of like a case between a parent and a third party (i.e. a state intervention case) was presented in detail in the father's Appeals Court brief. (*See, e.g.*, p. 2, pp. 33-40.) The father's Appeals Court Brief argues *inter alia* that the trial court erred by applying a mere preponderance of the evidence standard to a custody dispute between parents and a third party, that the judgment must be reversed because throughout the four years of pre-trial proceedings the burden of proof was placed on the father, and that the definition of unfitness[7] applied by the trial judge was not the appropriate definition. (*Id.* at pp. 33-40.)

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6. Refers to Appendix filed in the Massachusetts Appeals Court.

7. At the oral argument before the Massachusetts Appeals Court one of the justices asked a question about authority in support of the argument that there is state intervention when the party seeking custody is not the Department of Social Services.

Similarly, the father's fundamental due process right to be heard appears in the father's Appeals Court brief pp. 40-43, which describes how the father was deprived of fundamental procedural and substantive due process rights by the pre-trial procedures which were outcome determinative of the trial. (*Id.* at 40.) The father argued that the *ex parte* orders deprived the father of procedural and substantive due process and that the *ex parte* communications with the trial judge deprived the father of procedural and substantive due process. (*Id* at 41-43.) (These issues were argued again in the father's Application for Further Appellate Review, filed in the Supreme Judicial Court of Massachusetts.)

In short, this Court should hear the instant case because just like before *In Re Gault*, 387 U.S. 1, 13 (1967), the lower courts are ignoring the procedural due process rights of children (and parents). Also the lower courts are refusing to recognize that when the state intervenes in the family to award custody to a third party (even if the third party is not the Department of Social Services), the case still must be treated under the standards set forth in state intervention cases (*Santosky v. Kramer*, 455 U.S. 745, 765 n.15 (1982)) as opposed to the standards appropriate in divorce proceedings between two parents. In short, this Court should decide whether the thousands of guardianship petitions brought each year should be decided under divorce petition standards or those of state custody petition standards. As there is no right to an attorney in third party guardianship cases this important constitutional issue has been evading review.

Also as in *Gault*, the level of procedural due process in the trial courts deciding custody of children should be addressed by this Court. How many *ex parte* communications are too many to comport with fair play and substantial justice?

REASONS FOR GRANTING THE WRIT

I.

WHEN THE STATE INTERVENES IN THE FAMILY TO GRANT CUSTODY TO A THIRD PARTY, DUE PROCESS REQUIRES THAT THE STANDARDS APPLICABLE TO CHILD PROTECTION CASES APPLY (AS OPPOSED TO THOSE APPLICABLE TO DIVORCE PROCEEDINGS).[8]

A. The Burden of Proof Should Be By Clear and Convincing Evidence.

The father's constitutional rights under the due process clause were infringed by the treatment of the guardianship case like a divorce case. In *MLB v. SLJ*, 117 S. Ct. 555 (1996), the United States Supreme Court stated:

> [A] parent's desire for any right to the companionship, care, custody and management of his or her children is an important interest, — one that undeniably warrants deference absent a powerful countervailing interest, protection.

Id., 117 S. Ct. at 564 (emphasis added).

Hence, this Court should declare that the proper burden of proof here is that described in *Santosky v. Kramer*, 455 U.S. 745 (1982), that is, clear and convincing evidence.

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8. The rule of *Adams v. Robertson*, 520 U.S. 83, 117 S. Ct. 1028, 1029 (1997) is that a federal constitutional claim is preserved if "it was either addressed by, *or promptly presented to*, the state court that rendered the decision we have been asked to review." (emphasis added).

It is clear that there is "state action" here despite the state not being a party to the guardianship proceedings. *See Freeman v. Chaplic*, 388 Mass. 398, 407 (1983) ("while the state here is not seeking custody of the child for itself, its intervention against the wishes of the parents must serve some substantial interest of the state.") *Also see Carr v. Carr*, 44 Mass. App. Ct. 924 (1998), *review denied*, 427 Mass. 1104, *cert. denied*, (1998) (not a state imposed limitation on father's rights and due process did not require a detailed demonstration of harm to the child as it was the parents, rather than the state, who sought to impair each other's rights.)

B. The Definition of Unfitness Applied Must Include A Character Flaw Measurable by Objective Standards And Not By A "Best Interests" Test.

The definition applied below is purely a best interests test. The trial judge's Findings and Conclusions state:

> In determining whether parents are unfit, the most important consideration is whether the welfare of the child would be served by custody in them or in a guardian.

Appendix B at p. 19a, ¶ 8. Also see p. 19a, ¶ 6 (not necessary that the stigma of unfitness first be placed upon the parents).

In sharp contrast *MLB v. SLJ* requires "a powerful countervailing interest, protection." Here the Appeals Court inappropriately relied on *Adoption of Oliver*, 28 Mass. App. Ct. 620, 625 (1990) which involved an alcoholic mother and a fetal alcohol syndrome child, with severe special needs, who did not even interact with his mother during visits. Unlike here, in *Oliver*, there was some showing of "endangerment

of the child" before reaching the question of best interests. There was also a showing of a character flaw on the part of the mother, *i.e.*, alcoholism.

C. The Burden to Prove His Fitness Was Unconstitutionally Shifted To The Father After The Grandparents Obtained Custody *Ex Parte.*

As discussed above, in the Facts at page 3, the court investigator ("GAL") testified that the father failed "to woo Josephine"; she also placed the burden of proof on the father by requiring him to have a psychological evaluation, which concluded that the father is "normal". The grandfather, who has a history of mental illness was not required to go for mental health testing nor was the grandmother who was taking medication for depression.

From time to time, the father made a motion for custody, which was invariably denied. On one occasion, in denying the father's Motion for Custody, the trial judge commented that he was not making a finding that the father was unfit, but merely that continuing to be with the grandparents was in the child's "best interests".

As discussed above, once the *ex parte* guardianship was placed in the grandparents, the burden of proof was shifted to the father to prove his fitness and to overcome the bonding that naturally occurs between a caretaker and a child.

In short, the father was unconstitutionally required to prove his fitness as a prerequisite to obtaining custody.

II.

THIS COURT HAS NOT PREVIOUSLY DETERMINED THE TEST FOR IDENTIFYING A DUE PROCESS VIOLATION WHEN THERE ARE MULTIPLE *EX PARTE* ORDERS AND *EX PARTE* COMMUNICATIONS CONCERNING THE FUNDAMENTAL ISSUE IN THE CASE.

Some of the *ex parte* orders and *ex parte* communications that occurred below were described *supra* in the Statement of the Case.

The father's petition for writ of certiorari should be granted because the opinion below conflicts with this Court's important prior rulings on a litigant's fundamental due process right to a fair trial. In delineating the contours of this right, this Court has consistently identified "impartiality" as one of two necessary attributes of a trier of fact, the other being "mental competence". *Jordan v. Commonwealth of Massachusetts*, 225 U.S. 167, 176 (1912); *Tanner v. United States*, 483 U.S. 107, 126 (1987) (Same).

The examples of communication directly with the judge listed above on p. 5 primarily resulted in extensions of the guardianship in the grandparents and *ex parte* termination of weekend visits as well as of the opportunity to be heard post-termination. (The hearing on the *ex parte* suspension of weekend visits never happened because of a letter directly to the trial judge by the GAL falsely stating that the parties agreed not to have a hearing.)

The deprivation of a hearing biased the trial judge. *See Duro v. Duro*, 392 Mass. 574, 580 (1984). ("[F]undamental

fairness as well as due process concerns require that a parent be given an opportunity effectively to rebut adverse allegations concerning his or her child rearing capabilities."); *Adoption of Carla*, 416 Mass. 510, 514 (1993) (Same); and *Matter of Guardianship of Garrand*, 624 N.E.2d 68 (Ind. App. 1993) (*Ex parte* communication between Judge and G.A.L. who had prepared a report in connection with a guardianship proceeding was reversible error and even later testimony of an expert could not cure the appearance of impropriety.)

Hence, the writ of certiorari should be granted to clarify when *ex parte* communications sink to the level of a due process violation.

CONCLUSION

This case presents two questions of exceptional importance: (1) whether when the state intervenes in a family to grant custody to a third party, does due process require that the standards applicable to child protection cases be applied as opposed to those applicable to a divorce case? and (2) whether *ex parte* communications which deprive a parent of a hearing on custody and visitation issues violate due process?

If the opinion below is allowed to stand, the father will have been denied due process, as will many other similarly situated parents, whose children have been placed in the custody of third parties without appropriate procedures.

Accordingly, the father respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — UNPUBLISHED MEMORANDUM AND ORDER UNDER RULE 1:28 OF THE COMMONWEALTH OF MASSACHUSETTS APPEALS COURT DATED AND ENTERED DECEMBER 3, 1998

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

[redacted]

GUARDIANSHIP OF JOSEPHINE.[1]

MEMORANDUM AND ORDER UNDER RULE 1:28

This is an appeal from a decree entered by a Probate Court judge appointing the maternal grandparents of the ward, her permanent guardians. We affirm.

In March, 1992, the biological mother became incapable of caring for Josephine because of the mother's fragile mental condition. At that time, Josephine was placed in the physical custody of the grandparents by the Department of Social Services (DSS). In July, 1996, the grandparents were appointed temporary guardians with custody of Josephine. The biological father, received notice of the guardianship proceedings by certified mail in August, 1992, while he was residing in Texas. In October, 1992, the father filed an agreement with the court relative to custody and visitation that provided that Josephine's primary residence would temporarily remain with the grandparents.

The grandparents have served as primary caretakers of Josephine since July, 1992. Josephine has expressed her desire

1. A pseudonym.

that if she cannot live with her mother, she wishes to continue to reside with her grandparents.

"At the core of the inquiry is the question of what is in the best interests of the child, although the answer to that question in any given case is bound up with the determination of unfitness. The child's best interests may bear on how much parental deficiency is tolerable, or, conversely, the degree of parental deficiency may determine the child's best interests." *Adoption of Katharine*, 42 Mass. App. Ct. 25, 28 (1997). "Nearly all the relevant cases have considered the best interests of the child in determining whether the parents are unfit." *Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption*, 367 Mass. 631, 641 (1975) (citation omitted). "Therefore, 'if returning custody to the natural parents would be seriously detrimental to the welfare of the child, then the parents could be considered to be unfit.' " *Guardianship of Clyde*, 44 Mass. App. Ct. 767, 773 (1998) (citation omitted).

The Probate Court judge concluded that the best interests of Josephine would be served by granting the grandparents custody of her. This case is analogous to *Adoption of Oliver*, 28 Mass. App. Ct. 620, 625 (1990), where this court determined that the minor's development required that he live "in an enriched environment . . . by which the doctor meant that he must have sustained contact with persons willing to take an active interest in his everyday life and willing to encourage him to take responsibility for himself." Similarly, in the present case the judge concluded that, "[a]t the time of trial . . . the relationship between Josephine and her father had not improved and in fact, had worsened. [The father] remains incapable or unabler [sic] to comprehend Josephine's limitations, to

appreciate her discomfort when he criticizes people she loves, and he does not or cannot provide her with the nurturance and emotional support Josephine needs from a parent, and he provides her with no support academically." (A. 66) See *Guardianship of Clyde, supra.*

There was "ample evidence to support these subsidiary findings on which the judge based his decision." *Petition of Catholic Charitable Bureau to Dispense with Consent to Adoption*, 13 Mass. App. Ct. 936, 937 (1982). Those findings are sufficiently "specific and detailed so as to demonstrate that close attention has been given the evidence" and consequently meet the standard of proving "current parental unfitness clearly and convincingly." *Custody of Eleanor*, 414 Mass. 795, 799 (1993).

Decree affirmed.

By the Court (Warner, C.J., Kaplan & Brown, JJ.),

s/ Ashley Ahearn
Clerk

Entered: December 3, 1998

Appendix A

Commonwealth of Massachusetts
Appeals Court for the Commonwealth
At Boston,

In the case no. [redacted]

GUARDIANSHIP OF JOSEPHINE.

* * *

Pending in the Probate
Court for the County of Essex

Ordered, that the following entry be made in the docket:

Decree affirmed.

By the Court,

s/ Ashley Ahearn, Clerk
Date December 3, 1998

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE PROBATE AND FAMILY COURT FOR THE COUNTY OF ESSEX DATED OCTOBER [redacted]

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX DIVISION

PROBATE AND FAMILY COURT DEPARTMENT
DOCKET NO. [redacted]

C[redacted] F[redacted]

Plaintiff

v.

[redacted] F[redacted]

Defendant

COMPLAINT FOR MODIFICATION

ESSEX DIVISION

PROBATE AND FAMILY COURT DEPARTMENT
DOCKET NO. [redacted]

GUARDIANSHIP OF [redacted]

GUARDIANSHIP OF A MINOR

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appendix B

Upon hearing, the Court finds and rules as follows:

1) [redacted] was born on March 25, 1983 in [redacted] MA.

2) C[redacted] F[redacted] is [redacted] biological mother.

3) R[redacted] F[redacted] is [redacted] biological father.

4) R[redacted] C[redacted] and A[redacted] C[redacted] ("the [redacted]") are [redacted] maternal grandparents.

5) R[redacted] F[redacted] and C[redacted] F[redacted] formerly husband and wife, were divorced by Judgment of the Middlesex Probate and Family Court on January 6, 1987.

6) C[redacted] F[redacted] was granted physical custody of [redacted]

7) Said *JUDGMENT OF DIVORCE* provides in part, the following:

"1. The parties shall have joint custody and control of the child, subject to the following:

(a) Physical custody of the child shall be with the wife."

8) R[redacted] F[redacted] on or about December 1, 1991, established domicile in Houston, Texas.

9) On or about March 1, 1992, C[redacted] F[redacted] because of mental illness, became incapable of caring for [redacted]

Appendix B

10) On or about March 1, 1992, [redacted] by Department of Social Services intervention, was placed in the physical custody of the C[redacted]

11) On or about July 28, 1996, [redacted] and [redacted] were appointed Temporary Guardians with custody of [redacted] in Essex Probate and Family Court ([redacted]).

12) On or about August 18, 1992, R[redacted] F[redacted] while still in Texas, received notice of said Guardianship proceedings by certified mail.

13) The C[redacted] have, at all times relevant hereto, (i.e. March 25, 1983 to this date) resided at [redacted], MA.

14) When [redacted] came to reside with the C[redacted] on or about March of 1992, she began attending [redacted] public schools.

15) [redacted] since that date, has continued to attend the [redacted] public schools.

16) When [redacted] came to reside with the [redacted]s on or about March of 1992, she began to regularly attend church at the Second Congregational Church of [redacted], [redacted] continues to this date to regularly attend such church.

17) On or about June 8, 1992, R[redacted] R[redacted] filed a *COMPLAINT FOR MODIFICATION* relative to his child support obligation.

18) During the summer of 1992, R[redacted] F[redacted] returned to the Commonwealth from Texas and established a residence in [redacted], MA.

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19) On or about October 2, 1992, R[redacted] filed with the Court an "*AGREEMENT*" relative to custody and visitation with[redacted] that provided, in part, that [redacted] primary residence would temporarily remain with the [redacted]

20) In or about August 1993, R[redacted] F[redacted] married his present wife, J[redacted] R[redacted]

21) On or about June 1, 1993, R[redacted] F[redacted] and [redacted] F[redacted] established a residence at [redacted] New Hampshire, where they still reside.

22) On or about October 5, 1992, Malcolm MacLean, Esquire of Danvers, MA was appointed Guardian-ad-Litem for C[redacted] F[redacted] He continues to serve in that capacity.

23) On or about August 13, 1993, Elizabeth Dunn, Esquire of Salem, MA was appointed Guardian-ad-Litem for[redacted]

24) On or about July 16, 1996, Edith Luray, Esquire of Marblehead, MA was appointed Guardian-ad-Litem for [redacted] for matters relating to waiver of the psychotherapist-patient privilege.

25) I[redacted] has received counseling/psychotherapy with [redacted] Children's Hospital, [redacted] MA, and of this date, continues to do so.

26) The C[redacted] have served as Guardians with custody of [redacted] since on or about July 28, 1992 to this date, and they have at all times within that period, been her primary caretakers.

27) R[redacted] F[redacted] by present Temporary Order of this Court, is allowed to see and tak[redacted] for visitation during the

period 1:00 p.m. until 5:00 p.m. each Sunday with the restriction that such visits not include his wife, J[redacted] F[redacted]

28) R[redacted] F[redacted] presently pays the sum of $225.00 per week to the C[redacted] as child support.

29) In the fall of 1991, Mr. F[redacted] stopped paying child support.

30) At that time, i.e., the fall of 1991, C[redacted] began to decline emotionally, leading to her inability to care for [redacted] for approximately two years.

31) By the fall of 1993, Mr. F[redacted] had not paid any child support for [redacted] for approximately two years.

32) At this time, Mr. F[redacted] was evidencing an extremely naive approach to parenting his daughter and was reported by his daughter, and others, to be quick to anger and such anger could be frightening.

33) From the date of R[redacted] F[redacted] and C[redacted] F[redacted] separating, leading up to their divorce, R[redacted] F[redacted] had no real parenting responsibilities, his contact being limited to telephone calls and weekly visits with his daughter.

34) At this time, in the fall of 1993, Mr. [redacted] had his daughter with him three days per week.

35) At this time, in the fall of 1993, Mrs. C[redacted] was intimately involved with all aspects of [redacted] life working closely with [redacted] school, therapist, and with [redacted]

individually, on her academics and peer relationships. She was a source of constant encouragement to [redacted], who at that time was in need of such encouragement.

36) At this time, Mr. [redacted] supported Mrs. [redacted] in her efforts on behalf of [redacted] and had a good relationship with [redacted]

37) At this time, in the fall of 1993, [redacted] was a special education student in the [redacted] Elementary School.

38) At this time, [redacted] in addition to being a special education student, was a child of poor self-image, low self-esteem, and lacking in social skills. She also had visual perception and motor skills problems.

39) In addition to being a special education student, in addressing the deficiencies outlined in the preceding paragraph, [redacted] was seeing the school adjustment counselor, and she was receiving occupational therapy at school.

40) At that time, in the fall of 1993, projective testing indicated that [redacted] was a child who felt abandoned by parental figures.

41) At the time, Mr. F[redacted] felt that Mrs. C[redacted] was overprotective of [redacted] while at the same time, he was not sufficiently sensitive to his daughter's needs, nor was he able to communicate with his daughter effectively.

42) At the time, in the fall of 1993, Mr. [redacted] did not have the ability, capacity, fitness, readiness, and skills to parent [redacted]

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43) By April of 1994, Mr. F[redacted] had not grown in appreciation of [redacted] special needs and continued to minimize them. He continued to feel that Mrs. [redacted] was overprotective of [redacted]

44) At the time, [redacted] was afraid to honestly express her opinions to her father, fearing that he might become angry with her.

45) At the time, the thought of residing full time with her father was visibly upsetting to [redacted]

46) In September of 1994, Mr. F[redacted] was living in New Hampshire.

47) At the time, despite [redacted] perception that she needed someone to talk to and to tell how she really felt, Mr. F[redacted] did not feel that counseling for [redacted] was necessary.

48) At the time, Mr. F[redacted] continued to exhibit an anger toward [redacted] that she did not understand and was a cause for a growing discomfort on her part as to her relationship with her father.

49) At the time, [redacted] was afraid of her father, expressed a desire to spend less time with him, and found [redacted] F[redacted] Mr. F[redacted] wife, to be unfairly critical of her.

50) At the same time, Mr. [redacted] remained insensitive to his daughter's needs and their relationship, rather than growing, was deteriorating rapidly.

51) Because of the foregoing, the Guardian-ad-Litem for [redacted] recommended that visitation between [redacted] and her father

be decreased, that Mr. [redacted] submit himself to a parenting evaluation immediately, and that [redacted] be engaged in therapy immediately despite her father's feelings that such therapy was not necessary.

52) In December of 1994, [redacted] desire was to continue to live with her grandparents and to limit her visitation with her father.

53) At the time, Mr. [redacted] and his second wife, continued to be insensitive to [redacted] and failed to appreciate how much assistance she needed with her school work.

54) At the time, [redacted] remained fearful of her father and the verbal communication between them remained poor.

55) By June of 1995, [redacted] was experiencing physical symptoms of the stress of her relationship with her father, reporting headaches and stomach aches immediately prior to her visit with him.

56) At the same time, [redacted] was still very afraid of her father's anger and that she did not know what made him angry.

57) At the same time, [redacted], [redacted] therapist, found the visits between [redacted] and her father to be harmful to [redacted] and causing a great deal of stress in her life.

58) At the same time, [redacted] determined that the actions of Mr. [redacted] and his nonappreciation of [redacted] special needs were causing [redacted] to deteriorate both physically and emotionally.

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59) In September of 1995, Mr. [redacted] appeared at the [redacted] residence and demanded to take [redacted] overnight.

60) The incident caused [redacted] to be frightened to the extent that she hid under a table within the [redacted] residence.

61) At the time, the Guardian-ad-Litem for [redacted] recommended all visits between [redacted] and her father be suspended.

62) By November of 1995, Mr. [redacted] was still unappreciative of his daughter's needs and [redacted] was distressed by the level of verbal assault that both Mr. [redacted] and his second wife subjected her to.

63) Mr. [redacted] at this time, continued to display little or no appreciation for [redacted] developmental delays and her need for socializing with her peers.

64) At this time, both [redacted], [redacted] therapist, and [redacted] Guardian-ad-Litem, concluded that continued visitation between [redacted] and her father was harmful to [redacted]

65) As early as March of 1992, [redacted] has been diagnosed with a number of developmental delays on many levels including academic, emotional and social.

66) These deficiencies include severe disabilities in visual perception and motor skills, general learning disabilities, and delayed development in sound identification.

67) The [redacted] public schools reported in June of 1993 that [redacted] was socially immature and depended on adults for

guidance, support and security, the way a much younger child would.

68) In March of 1995, the [redacted] public schools reported that [redacted] required frequent positive feedback and encouragement and that [redacted] relied heavily on adults to tell her what was expected of her.

69) At that same time, the [redacted] public schools reported that [redacted] would continue to need many supports in middle school.

70) In June of 1995, the [redacted] public schools reported that [redacted] was a child greatly dependent on others for positive feedback, in the absence of which she would become insecure and self-critical.

71) At that time, the [redacted] public schools reported that [redacted] was about to enter middle school with the ego coping functions of a second grader.

72) At that time, the [redacted] public schools further described [redacted] as particularly sensitive and a child with profound handicaps in the areas of visual memory, fine motor coordination, visual perception, inferring whole/part relationship and figure/ground discrimination. She was described as a childlike, dependent young lady, who could react catastrophically to negative criticism.

73) Ms. [redacted] while [redacted] attended middle school (sixth grade) worked with [redacted] approximately three hours each day and/or weekends to assist [redacted] in continuing to perform at her academic level.

74) At the time of trial and following the reduction of visitation time with her father, and the exclusion of Mr. F[redacted] second wife from such visits, [redacted] was exhibiting fewer signs of stress.

75) During [redacted] first year of middle school, Mr. [redacted] had little or no contact with [redacted] school or [redacted] therapist.

76) At the same time, Ms. [redacted] worked very closely with the school and was the person who insured that [redacted] attended therapy.

77) At the time of trial, despite numerous avenues for such information to be made available to him, Mr. F[redacted] had no comprehension of [redacted] day-to-day life and had made no effort to learn.

78) At the time of trial and despite about a four year history to achieve same, the relationship between [redacted] and her father had not improved and in fact, had worsened. Mr. F[redacted] remains incapable or unabler to comprehend [redacted] limitations, to appreciate her discomfort when he criticizes people she loves, and he does not or cannot provide her with the nurturance and emotional support [redacted] needs from a parent, and he provides her with no support academically.

79) Both Mr. F[redacted] and his present wife have an unrealistic approach to parenting [redacted], and they have no plan as to how to address her academic, emotional and social shortcomings.

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80) Both Mr. F[redacted] and his present wife believe that one aspect of the solution to [redacted] known and reported deficiencies is only that she develop a "thicker skin."

81) At this time, [redacted] does not wish to live with her father, in fact, if she could choose, would not wish to even visit with him and has articulated valid reasons for this desire, including fear of her father's anger, her father's criticizing the grandparents that she loves, and a fear based on past experience that her father will be unwilling or unable to help her with her schoolwork.

82) At this time, Mr. F[redacted] earns $1,575.00 per week gross (Financial Statement filed).

83) R[redacted] F[redacted] has never parented [redacted]

84) R[redacted] F[redacted] is unfit to be the custodial parent of L[redacted] F[redacted], for he is unwilling or unable to appreciate her emotional, social, learning and physical disabilities.

85) R[redacted] F[redacted] rather than establishing a meaningful relationship with his daughter, has moved from having his daughter with him three days a week to having visitation rights with his daughter for four hours per week.

86) [redacted] does not wish even this reduced visitation to continue and has continuously expressed her desire not to reside with her father.

87) [redacted] has no desire to visit or be with [redacted] R[redacted] second wife, as she has no relationship with her and [redacted] finds her only to be critical of her.

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88) J[redacted] has no appreciation of [redacted] special needs.

89) Both [redacted] and J[redacted] have an unrealistic view of parenting [redacted] and have no plan for addressing [redacted] special needs nor integrating her into their household.

90) R[redacted] has not taken [redacted] to his house in [redacted] New Hampshire during a visit for some period of time, as present visits are not to include [redacted] and she does not leave the house on Sunday and apparently is unwilling to do so.

91) [redacted] was abandoned by her father in 1991.

92) For a significant period of time during which C[redacted] became unable to care for her daughter, Mr. F[redacted] failed to maintain meaningful contact with his daughter and failed to support his daughter.

93) Mr. F[redacted] expressions of anger and other conduct toward [redacted] are emotionally abusive of [redacted]

94) The best interests of [redacted] would be served by granting Mr. and Mrs. C[redacted] custody of her as she has an open and loving relationship with both of them; they are supportive, encouraging, devoted to her, and she has overcome many of her disabilities in their care.

95) [redacted] has expressed her desire that if she cannot live with her mother, she wishes to continue to reside with her grandparents to attend [redacted] public schools, to attend the church near the [redacted] home, and to continue to center her social life on her friends in [redacted]

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96) In accordance with present child support guidelines, Mr. F[redacted] financial obligation for child support should be $ 350.00 per week. (*CHILD SUPPORT GUIDELINE WORKSHEET* attached hereto and incorporated herein by reference.)

CONCLUSIONS OF LAW

1) The right of parents to be free from intrusion by the State in matters of childrearing is not absolute. *Custody of a Minor (1)*, 377 Mass. 233, 747, 748, (1978).

2) In matters that may require a partial or complete severance of a parent/child relationship, "The first and paramount duty of courts is to consult the welfare of the child. To that governing principle, every other public and private consideration must yield." *Richards v. Forest*, 278 Mass. 553, (1932).

3) [W]here a child's well being is placed in issue, 'it is not the rights of the parents that are to be chiefly considered'." *Custody of a Minor (2)*, supra @ 749.

4) ". . . the right . . ." of parents ". . . will not be enforced to the detriment of the child." *Richards v. Forest*, supra.

5) In the context of a modification of divorce proceeding, the Court may ". . . award their [the minor children's] custody to some third person if it seems expedient for the benefit of the children" . . . ". . . and the Judgment for Modification is in the best interest of the children." M.G.L. c. 208 §28.

Appendix B

6) "It is not essential to the exercise of this power [i.e., to place a child in the custody of a third person in a modification proceeding] that the stigma of unfitness first be placed upon the parents. *Perry v. Perry*, 278 Mass. 601, 605 (1932), *Freemen v. Chaplic*, 388 Mass. 398, 406, n.14 (1983).

7) If necessary, in defining "unfitness" ". . . the central question is whether the natural parents are currently fit to further the welfare and best interests of the child." *Bezio v. Patnaude*, 381 Mass. 576 (1980).

8) "In determining whether parents are unfit, the most important consideration is whether the welfare of the child would be served by custody in them or in a guardian. *Adoption of a Minor*, 343 Mass. 292, 296, (1961), quoting from *Adoption of a Minor*, 338 Mass. 635, 643 (1959)

9) In judging parental fitness, the Court must analyze the parent's character, temperament, capacity, and conduct in relation to the particular child's needs, age, affections, and environment. *Adoption of Carlos* (1991), quoting *Petition of the Dept. of Public Welfare to Dispense with Consent to Adoption*, 383 Mass. 573, 589 (1981).

10) "If returning custody to the natural parents would seriously detrimental to the welfare of the child, then the parents should be considered to be unfit." *Bezio v. Patnaude*, supra @ 575, quoting from *Wilkins v. Wilkins*.

11) Custody determinations do not require proof by clear and convincing evidence, rather must be proven by a "persuasive showing." *Custody of a Minor (1)*, supra @ 885-886.

Appendix B

12) The Child Support Guidelines promulgated pursuant to M.G.L. c. 211B, §15 were formulated, in part, to provide children with the standard of living they would have enjoyed if the family had stayed intact. *CHILD SUPPORT GUIDELINES* EFFECTIVE January 1, 1994.

13) "In furtherance of the public policy that dependent children shall be maintained as completely as possible from the resources of their parents and upon a complaint filed after a Judgment of Divorce, orders of maintenance and for support of minor children shall be modified if there is an inconsistency between the amount of the existing order and the amount that would result from application of the child support guidelines promulgated by the Chief Justice for Administration and Management, or if there is a need to provide for the health care coverage of the child." M.G.L. c. 208, §28.

October 21, 1996

s/ William Highgas, Jr.
William Highgas, Jr., Justice
Essex Probate and Family Court

APPENDIX C — DECREE AND ORDER OF THE PROBATE COURT FOR THE COUNTY OF ESSEX DATED OCTOBER 30, 1996

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. DOCKET No. [redacted]

TO THE PROBATE COURT:

GUARDIAN – MINOR – WITHOUT SURETIES

Names of Wards	Residence	Date of Birth
[redacted]	[redacted]	March 25, 1983

Name and Address of Petitioner(s) [redacted] and [redacted] both of [redacted] MA [redacted] Status grandparents – maternal

* * *

DECREE

After Hearing

All persons interested having been notified in accordance with the law or having asserted and no objections being made thereto, it is decreed that [redacted] and [redacted] both of [redacted] in the County of Essex be appointed guardians with custody of the person and of the estate of said minor [illegible] giving bond with sureties for the due performance of said trust. It is further ordered that [redacted] shall pay the sum of $350.00 each week for child support. It is further ordered that

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R[redacted]F[redacted] shall have visitation every Sunday from 1:00 p.m. until 4:00 p.m.

Date Oct 30, 1996

s/ William Highgas, Jr.
Judge of Probate Court

APPENDIX D — LETTER NOTICE OF THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS DATED FEBRUARY 12, 1999 OF ITS JANUARY 25, 1999 DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

R[redacted] F[redacted]
[redacted]
[redacted] NH [redacted]

RE: Docket No. FAR-[redacted]

GUARDIANSHIP OF JOSEPHINE

Essex Probate & Family No. [redacted] GM1
Middlesex Superior No. [redacted] D1
A.C. No. [redacted]

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on January 25, 1999, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated: February 12, 1999

To: R[redacted] [redacted]
Robert A. Munroe, Esquire
Kevin D. Cooper, Esquire
Jacqueline Y. Parker, Esquire
Malcolm F. MacLean, III, Esquire
Elizabeth B. Dunn, Esquire

APPENDIX E – MASSACHUSETTS GENERAL LAWS C. 201, § 5 AND C. 208, § 28

201 §5. Minors; custody and education; marriage; effect

The guardian of a minor shall have the custody of his person and the care of his education, except that the parents of the minor, jointly, or the surviving parent shall have such custody and said care unless the court otherwise orders. The probate court may, upon the written consent of the parents or surviving parent, order that the guardian shall have such custody; and may so order if, upon a hearing, and after such notice to the parents, jointly, or the surviving parent as it may order, it finds such parents, jointly, or the surviving parent, unfit to have such custody; or if it finds one of them unfit therefor and the other files in court his or her written consent to such order. The marriage of a person under guardianship as a minor shall deprive his guardian of all right to the custody and education of such person but not the care and possession of such person's property. If a corporation is appointed guardian of a minor, the court may, subject to the right of his parents, or of the spouse of a minor, as provided in this section, award the custody to some suitable person.

208 §28. Children; care, custody and maintenance; child support obligations; provisions for education and health insurance; parents convicted of first degree murder

Upon a judgment for divorce, the court may make such judgment as it considers expedient relative to the care, custody and maintenance of the minor children of the parties and may determine with which of the parents the children or any of them shall remain or may award their custody to some third person if it seems expedient or for the benefit of the children.

Appendix E

In determining the amount of the child support obligation or in approving the agreement of the parties, the court shall apply the child support guidelines promulgated by the chief justice for administration and management, and there shall be a rebuttable presumption that the amount of the order which would result from the application of the guidelines is the appropriate amount of child support to be ordered. If, after taking into consideration the best interests of the child, the court determines that a party has overcome such presumption, the court shall make specific written findings indicating the amount of the order that would result from application of the guidelines; that the guidelines amount would be unjust or inappropriate under the circumstances; the specific facts of the case which justify departure from the guidelines; and that such departure is consistent with the best interests of the child. Upon a complaint after a divorce, filed by either parent or by a next friend on behalf of the children after notice to both parents, the court may make a judgment modifying its earlier judgment as to the care and custody of the minor children of the parties provided that the court finds that a material and substantial change in the circumstances of the parties has occurred and the judgment of modification is necessary in the best interests of the children. In furtherance of the public policy that dependent children shall be maintained as completely as possible from the resources of their parents and upon a complaint filed after a judgment of divorce, orders of maintenance and for support of minor children shall be modified if there is an inconsistency between the amount of the existing order and the amount that would result from application of the child support guidelines promulgated by the chief justice for administration and management or if there is a need to provide for the health care coverage of the child.

Appendix E

A modification to provide for the health care coverage of the child shall be entered whether or not a modification in the amount of child support is necessary. There shall be a rebuttable presumption that the amount of the order which would result from the application of the guidelines is the appropriate amount of child support to be ordered. If, after taking into consideration the best interests of the child, the court determines that a party has overcome such presumption, the court shall make specific written findings indicating the amount of the order that would result from application of the guidelines; that the guidelines amount would be unjust or inappropriate under the circumstances; the specific facts of the case which justify departure from the guidelines; and that such departure is consistent with the best interests of the child. The order shall be modified accordingly unless the inconsistency between the amount of the existing order and the amount of the order that would result from application of the guidelines is due to the fact that the amount of the existing order resulted from a rebuttal of the guidelines and that there has been no change in the circumstances which resulted in such rebuttal; provided, however, that even if the specific facts that justified departure from the guidelines upon entry of the existing order remain in effect, the order shall be modified in accordance with the guidelines unless the court finds that the guidelines amount would be unjust or inappropriate under the circumstances and that the existing order is consistent with the best interests of the child. A modification of child support may enter notwithstanding an agreement of the parents that has independent legal significance. If the IV-D agency as set forth in chapter 119A is responsible for enforcing a case, an order may also be modified in accordance with the procedures set out in section

3B of said chapter 119A. The court may make appropriate orders of maintenance, support and education of any child who has attained age eighteen but who has not attained age twenty-one and who is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance. The court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three, if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance due to the enrollment of such child in an educational program, excluding educational costs beyond an undergraduate degree. When the court makes an order for maintenance or support of a child, said court shall determine whether the obligor under such order has health insurance or other health coverage on a group plan available to him through an employer or organization or has health insurance or other health coverage available to him at a reasonable cost that may be extended to cover the child for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor exercise the option of additional coverage in favor of the child or obtain coverage for the child.

When a court makes an order for maintenance or support, the court shall determine whether the obligor under such order is responsible for the maintenance or support of any other children of the obligor, even if a court order for such maintenance or support does not exist, or whether the obligor under such order is under a preexisting order for the maintenance or support of any other children from a previous marriage, or whether the obligor under such order is under a

preexisting order for the maintenance or support of any other children born out of wedlock. If the court determines that such responsibility does, in fact, exist and that such obligor is fulfilling such responsibility such court shall take into consideration such responsibility in setting the amount to paid under the current order for maintenance or support.

No court shall make an order providing visitation rights to a parent who has been convicted of murder in the first degree of the other parent of the child who is the subject of the order, unless such child is of suitable age to signify his assent and assents to such order; provided, further, that until such order is issued, no person shall visit, with the child present, a parent who has been convicted of murder in the first degree of the other parent of the child without the consent of the child's custodian or legal guardian.